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In the Supreme Court of the United States

OCTOBER TERM, 1982

BARTLEY BURNS,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Where the Court of Appeals reversed petitioner's conspiracy conviction for violation of F.R.Cr.P. 43(a)* in that the trial judge engaged, without notice to the defense, in a "discussion" of an "extended nature"† with the jury concerning an element of the offense, may petitioner's convictions nonetheless be affirmed on the remaining counts, which were not expressly the subject of the improper supplementary instruction, but which were necessarily affected by the judge's *ex parte* presence in the jury room?

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* Petitioner argued in the Seventh Circuit that the lower court's procedure violated, not only Rule 43(a) ("Presence of the Defendant"), but also his federally guaranteed constitutional rights to a fair trial, to be present at all stages of the proceedings, and to effective assistance of counsel. The Court of Appeals sustained petitioner's contention under Rule 43(a) and thus did not reach the constitutional issue. (See Opinion of Court of Appeals, Slip Opinion, p. 4; App. A, p. App. 5.)

† App. A, p. App. 7.

Parties Involved*

Petitioner, Bartley Burns, was one of a number of defendants in the District Court for the Northern District of Illinois, Eastern Division, and one of the two appellants in the Court of Appeals for the Seventh Circuit.† Respondent, the United States of America, was the prosecution (plaintiff) in the trial court and the appellee in the Court of Appeals. Both petitioner and respondent sought rehearing in the Court of Appeals. (App. B, pp. App. 12-13)

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* Per Rule 21.1(b).

† Petitioner Burns was indicted with Lawrence Kelly in Indictment No. 80 CR 517. They were tried together; both were convicted of conspiracy (count 1); petitioner was also convicted on seven mail fraud counts, and Kelly on nine mail fraud counts and two counts (tax evasion and obstruction of a criminal investigation) not applicable to Burns. Their consolidated appeals (Burns, No. 81-2028; Kelly, No. 81-2024) were disposed of in a single opinion. (App. A)

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By affirming those convictions which were not specifically the subject of the court's supplementary instruction, given in violation of F.R.Cr.P. 43(a) [not to mention due process of law], the decision below—by irrationally presuming that the jury's consideration of those charges was not affected by the violation, which required reversal of the conspiracy count to which it related—seriously erodes constitutionally compelled concepts of "harmless error" and invites piecemeal disposition of multi-conviction appeals in derogation of defendant's most basic rights.

Certiorari should be allowed to permit this Court to enforce a defendant's constitutional right to be present at all stages of the proceedings as codified by Rule 43(a), to preserve the integrity of the jury room, and to relieve this defendant of the convictions which are necessarily tainted by the concededly improper procedure | 8

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BARTLEY BURNS,

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VS.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Bartley Burns (hereafter, defendant, or Burns) respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, to review its decision affirming his convictions for mail fraud.[1]

[1] The Court of Appeals' decision reverses and remands his conviction for conspiracy (count 1) and remands the remaining seven mail fraud counts (counts 22, 23, 25, 27, 28, 29 & 31) for resentencing. (App. 2, 11) Defendant does not take issue with that part of the judgment which reverses his conviction on count 1.

Judgment and Opinion Below

The opinion of the Court of Appeals for the Seventh Circuit, No. 81-2028 (consolidated with No. 81-2024), not yet published, is set out as Appendix A, per Rule 21.1 (k)(i) of this Court.

Jurisdictional Statement

On July 16, 1982, the Court of Appeals for the Seventh Circuit decided its opinion affirming defendant's convictions for mail fraud, reversing and remanding his conviction for conspiracy, and remanding for resentencing on the mail fraud counts. (App. A) Defendant Burns' timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on November 16, 1982.[2] (App. B) This petition to review the judgment of a federal court of appeals in a criminal case is timely filed within 60 days after denial of petition for rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rules 20.1 & 20.4 of this Court.

Constitutional Provisions, Statutes and Rule Involved

The Fifth Amendment to the United States Constitution provides, in part:

> "No person shall be . . . deprived of . . . liberty without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to a trial, . . . and to have the Assistance of Counsel for his defence."

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[2] The government's petition for rehearing was also denied.

"18 U.S.C. § 1341 **Frauds and swindles**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matters or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

"18 U.S.C. § 1962 **Prohibited Activities**

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

F.R.Cr.P. 43(a) provides in pertinent part:

"(a) Presence required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence . . ."

STATEMENT OF THE CASE

Nature of the Case

Defendant was charged in a multiple-count indictment, No. 80 CR 517, with having conspired with eight others to violate the anti-racketeering and mail fraud statutes (18 U.S.C. 1962 & 1341, respectively), and in ten separate substantive counts of mail fraud. A jury found him guilty of conspiracy, Count 1, and of 7 counts of mail fraud (counts 22, 23, 25, 27, 28, 29 & 31). He was sentenced to 3 months custody and a fine of $5,000 on Count 1, and placed on probation for three years on the remaining counts, consecutive to the sentence on Count 1. (R. 165, Vol. II[3])

In a *per curiam* opinion, the Seventh Circuit reversed defendant's conviction upon Count 1, because:

> ". . . the trial judge, in response to a request from the jury for a supplementary instruction, entered the jury room during deliberations without advance notice to the defense and gave the jurors an oral definition of an element of one of the offenses charged in the indictment." (App. A, p. App. 2)

As to the remaining counts (22, 23, 25, 27, 29 & 31), the reviewing court affirmed the convictions but vacated the sentences and remanded for resentencing, (App. A, pp. 2, 11), "since it is at least possible that the fines and sentences on the other counts were influenced by the fact that the jury found defendant[s] guilty on count 1 . . ." (App. A, p. App. 11)

Defendant seeks review herein of that portion of the judgment below affirming the mail fraud convictions.

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[3] "R." refers to the Record on Appeal in 81-2028, and "Tr." to the Transcript of Proceedings at trial.

Jurisdiction of the Trial Court

Jurisdiction in the court of first instance is based upon 18 U.S.C. 3231, which provides in part that "The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." Defendant was charged with having committed offenses against the laws of the United States, to wit, 18 U.S.C. 1962 & 1341.

Statement of Facts

The facts generally are set out in the Seventh Circuit's opinion (App. A, pp. App. 2-3) and are not repeated here to avoid unnecessary duplication. In brief, defendant was accused of having served as a "runner" in an alleged scheme whereby,

> "Between 1974 and 1980, several high-ranking employees of the Cook County (Illinois) Board of Appeals effectuated thousands of unlawful property tax reductions by covertly circumventing the Board's procedures concerning applications for assessment reductions." (App. A, p. App. 2)

The specific facts pertinent to the *Question Presented* are:

The trial court instructed the jury with respect to Count 1, conspiracy in violation of 18 U.S.C. 1962(d), as follows:

> "A conspiracy is not proved unless the evidence establishes that at least one overt act was committed by at least one conspirator to further the purpose of the conspiracy. It is not necessary that all the overt acts charged in the indictment be proved and the overt act proved may itself be unlawful." (Tr. 1288-89)

There was, however, in the court's charge, no definition of "overt act."

After the jury had been deliberating for some hours, the Transcript of Proceedings reflects the following communication between the court and jury, at 3 p.m., (Tr. 1302), in the presence of the court reporter, in the jury room, without counsel for defendant or defendant being present:

"The Court: Good afternoon.
You asked what the definition of an overt act is.

A Juror: Yes.

The Court: An overt act is an open or manifest act. It is not what somebody thinks or plans; it is what somebody does.

In this case, it is charged that one or more of the things happened in paragraphs 12 through 17 or paragraphs 22 through 41, and these were done in furtherance of, according to the Government, the conspiracy.

So, an overt act in that context is one of those active-type actions, if proved, in furtherance of the conspiracy, if proved, as distinguished from something that somebody just planned or thought about but didn't take any action on.

A Juror: Something actually happened?

The Court: Something that actually happened. Does that help?

A Juror: Okay.

The Court: So, what the Government is charging is that certain things happened or at least one of them happened, and that what that was was in furtherance of the conspiracy as defined in the instructions.

A Juror: Everybody understand?
A Juror: Yes.
A Juror: I think so.
A Juror: That clears it up. Thank you."
(Whereupon, a recess was taken.) (Tr. 1303-04)

The court did not notify defendant or his counsel[4] of the query or of his intention personally to answer the jury's question. [Obviously, the jury had asked, "what is the definition of an overt act?" (Tr. 1303) See App. A, pp. App. 3-4[5]]

After receipt of the verdicts and polling of the jury, the following took place between the prosecutor and the judge, in open court and in the presence of defendant and counsel:

> "The Prosecutor: Your honor, do you want to make a record of the one question they had about overt act?
>
> The Court: I took the court reporter in—
>
> The Prosecutor: Fine.
>
> The Court: —when I responded to the question. So what I said is part of the record." (Tr. 1309-10)

The foregoing was the first indication, so far as defendant was aware, that there had been any question by the jury, to which the court had responded.

* * *

The Court of Appeals reversed and remanded Count 1 (conspiracy) for the Rule 43(a) violation, but affirmed the remaining convictions and remanded for resentencing on the mail fraud counts. (App. A, pp. App. 2, 11)

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[4] The post-trial motion specifically alleges there was no notice to counsel. (R. 174, par. 14.)

[5] "Although the record does not indicate how the matter was brought to the court's attention, it is clear that the trial judge responded by entering the jury room accompanied only by the court reporter, whereupon he voiced a supplementary instruction defining an 'overt act.'" (App. A, pp. 3-4)

REASON FOR GRANTING THE WRIT

By affirming those convictions which were not specifically the subject of the court's supplementary instruction, given in violation of F.R.Cr.P. 43(a) [not to mention due process of law], the decision below—by irrationally presuming that the jury's consideration of those charges was not affected by the violation, which required reversal of the conspiracy count to which it related—seriously erodes constitutionally compelled concepts of "harmless error" and invites piecemeal disposition of multi-conviction appeals in derogation of defendant's most basic rights.

Certiorari should be allowed to permit this Court to enforce a defendant's constitutional right to be present as codified by Rule 43, to preserve the integrity of the jury room, and to relieve this defendant of the convictions which are necessarily tainted by the concededly improper procedure.

Prefatory Statement

In a *per curiam* opinion, the Court of Appeals reversed and remanded defendant's conviction upon Count 1, (App. A, pp. 2, 11), because:

> ". . . the trial judge, in response to a request from the jury for a supplementary instruction, entered the jury room during deliberations without advance notice to the defense and gave the jurors an oral definition of an element of one of the offenses charged in the indictment." (App. A, p. App. 2)

As to the remaining counts (22, 23, 25, 27, 28, 29 & 31), the court affirmed the convictions but remanded for resentencing, (App. A, pp. 2, 11),

"since it is at least possible that the fines[6] and sentences on the other counts were influenced by the fact that the jury found defendants guilty on count 1 . . ." (App. A, p. App. 11)

By affirming the remaining convictions while reversing the conspiracy count for the unauthorized communication between the court and jury without notice to the defense, the Seventh Circuit has abdicated its duty to forge decisions designed to compel respect for the law in the only effective way—that is, by removing the incentive to disregard it.[7] Considering "*the imperative of judicial integrity,*"[8] and with a view toward the future of criminal justice in America, certiorari should be allowed, pursuant to the considerations expressed in Rule 17.1.

• • •

"Because of our concern for the orderly conduct of a trial by jury in a federal criminal case," said the Seventh Circuit, "we reverse and remand . . . as to the count which was the subject of the supplementary instruction." (App. A, p. App. 2) And, "since it is at least possible that the . . . sentences on the other counts were influenced by the fact that the jury found defendant[s] guilty on count 1,"

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[6] Kelly alone was fined on the non-conspiracy counts; defendant was sentenced to 3 years probation (concurrent on each of the 7 mail fraud counts), consecutive to the (now-defunct) sentence of 3 months in custody and a $10,000 fine on count 1. (R. 165, Vol. II)

[7] See discussion of supervisory power, pp. 15-16, *infra;* especially see *Mallory* v. *United States,* 354 U.S. 449, 453, 1 L.Ed.2d 1479, 1482 (1957); *Elkins* v. *United States,* 364 U.S. 206, 217, 4 L.Ed. 2d 1669, 1677 (1960).

[8] *Elkins, supra,* 364 U.S. at 222, 4 L.Ed.2d at 1680 (emphasis added), thus characterizing the gist of the *Olmstead* dissents. See fn. 18, p. 16, *infra.*

(App. A, p. App. 11), the reviewing court remanded for resentencing on the remaining counts. (*Ibid.*) [The colloquy requiring reversal and the background thereof are set out at pp. 5-6, *supra* and at App. A, pp. App. 3-4.]

The Folly of "Harmless Error"[9]

The Seventh Circuit's very analysis of why the trial court's sentencing decision on the non-conspiracy counts must be overturned demonstrates the fallacy of its Polly-annaesque conclusion that the jury's conviction decision upon those same counts may be permitted to stand. Just as it is "at least possible" that the sentencing decision was influenced by the fact of the count 1 conviction, (App. A, p. App. 11), so too is it "at least possible" that the jury's decision to convict defendant on those counts was influenced by the fact that they had determined him guilty upon count 1.

The vagaries of what makes a particular jury reach a particular decision are simply too ephemeral to permit speculation here that the count 1 conviction—reversed for blatant violation of F.R.Cr.P. 43(a)—did not influence the jury to convict on the remaining counts. Judges usually are presumed less likely than jurors to be subject to improper and/or extraneous influences; but the Seventh Circuit, in a most convoluted, bifurcated fashion, quixotically presumes that the judge was affected while the jury was not.[10]

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[9] Justice Tom Clark, sitting by designation, wrote: "'Harmless error' is swarming around the 7th Circuit like bees." *United States* v. *Jackson*, 429 F.2d 1368, 1373 (7 Cir. 1970).

[10] "Harmless error should never be predicated upon speculation." Judge Pell, concurring in *United States* v. *Matos*, 444 F.2d 1071, 1075 (7 Cir. 1971).

In the evidentiary posture of this multi-count trial, each of the specific mail fraud offenses allegedly was committed in furtherance of the scheme (conspiracy) alleged in count 1. Thus it is utterly illogical and unrealistic to suppose "that the potential prejudice, if any [of the contact between judge and jury], relates exclusively to the jury's disposition of the conspiracy count." (App. A, p. 7) Simply put, without the conspiracy conviction, it would be highly unlikely that the jury would have convicted defendant of mail fraud.[11]

The Error Here was Constitutional Error

Before constitutional error may be deemed "harmless," the reviewing court must be able to conclude, beyond a reasonable doubt, that the error complained of did not contribute to the verdict obtained. *Chapman* v. *California*, 386 U.S. 24, 17 L.Ed.2d 705, 710 (1967). In other words:

> "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24, 17 L.Ed.2d at 710-11.

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[11] It is worse than no answer at all to say, as the court does here, that the jury's individual consideration of various counts, as evidenced by its having acquitted Burns on 3 of the 10 counts of mail fraud, demonstrates that "the jury separately analyzed the law and the evidence applicable to each count." (App. A, p. App. 7) Such selective behavior by the jury cannot be cited to save the non-conspiracy-count convictions, considering the logical tie-in between the conspiracy and mail fraud charges here. Without the anchor of the conspiracy charge, it is both rational and possible to conclude that the jury might have acquitted him of all ten mail fraud charges, rather than just the three on which it did find him not guilty. It sticks in the craw to turn against defendant the bone thrown to him by the 3-count acquittal.

Here, although the Seventh Circuit decided only that the unauthorized court-jury contact during deliberations without notice to the defense violated F.R.Cr.P. 43,[12] the occurrence in question was not merely a rule violation; indeed, it violated defendant's most basic constitutional rights to due process of law, to be present at all stages of the proceedings, and also his right to counsel. It is clear that the trial court, by communicating with the jury without notice to defendant or his counsel, violated defendant's right to be present at all stages of the proceedings, to effective assistance of counsel, and to a fair trial; for the court, in answering the jury's query, communicated improperly with the jury by defining "overt act", an essential element of the conspiracy offense,[13] without giving defendant or counsel *an opportunity to participate* in connection with the court's communication.

The constitutional requirement that a defendant be present at all stages of the proceedings[14] is a basic tenet of

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[12] App. A, p. App. 5; indeed, "a *serious* violation of Rule 43(a)." *Ibid.* (Emphasis added.)

[13] Proof of at least one overt act is a necessary element of the conspiracy offense created by 18 U.S.C. 1962(d). See *e.g., United States* v. *Zemek*, 634 F.2d 1159, 1173 n.18 (9 Cir. 1980); *United States* v. *Palmeri*, 630 F.2d 192, 200 (3 Cir. 1980); *cf. United States* v. *King*, 521 F.2d 61, 63 (10 Cir. 1975) (reversing conviction under 21 U.S.C. 846 because, though no overt act need be alleged, one must be proved as an element of the offense and the jury was not so advised).

[14] Unless, of course, his presence is waived. See F.R.Cr.P. 43(b). Here, of course, without any prior notice that the jury had a question, there can be no waiver. (See App. A, p. App. 5, fn. 1.) Moreover there can be no suggestion of waiver where, as here, what took place, took place, not in the courtroom, but in the jury room. See *Ah Fook Chang* v. *United States*, 91 F.2d 805, 809 (9 Cir. 1937) (". . . a trial is supposed to take place in the courtroom.").

American jurisprudence. *Hopt* v. *Utah*, 110 U.S. 574, 28 L.Ed. 262 (1884); *Lewis* v. *United States*, 146 U.S. 370, 36 L.Ed. 1011 (1892); *Illinois* v. *Allen*, 397 U.S. 337, 25 L.Ed. 2d 353 (1970). This has been codified into the Federal Rules of Criminal Procedure. Rule 43 (Presence of the Defendant) provides:

> "(a) Presence required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence . . ."

"[T]he error inherent in the trial court's conduct," (App. A, p. App. 5), involves two important interests which are undermined by private discourse between judge and jury during deliberations:

> "First, it gives rise to 'Star Chamber' implications which detract from the appearance of justice. Second, it absolutely precludes the parties from making a record as to the context in which the judge's remarks were made, thereby thwarting appellate review; the parties and this court must remain forever in the dark as to the judge's tone of voice and physical demeanor while he was in the jury room." (App. A, p. App. 6)

The reason for requiring notice to defendant and counsel prior to the giving of additional instructions to the jury upon their mid-deliberation query is clear—that is, to give defendant an opportunity to object; indeed, to afford him that most rudimentary right: the opportunity to be heard.

> "[T]he orderly conduct of a trial by jury, essential to the proper protection of the *right to be heard*, entitles the parties . . . to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the

> verdict." *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 81, 63 L.Ed. 853, 855 (1919), quoted with approval in *Rogers* v. *United States*, 422 U.S. 35, 38, 45 L.Ed.2d 1, 5-6 (1975). (Emphasis added.)[15]

In *Rogers, supra*, relied on by the Seventh Circuit here (App. A, p. App. 5), Your Honors reversed for an unauthorized communication between the court and jury without notice to defendant or his counsel, holding:

> "Cases interpreting the Rule [43] make it clear, if our decisions prior to the promulgation of the Rule left any doubt, that the jury's message should have been answered in open court and that petitioner's counsel should have been given an *opportunity to be heard* before the trial judge responded." 422 U.S. at 39, 45 L.Ed.2d at 6. (Emphasis added.)

The violation in *Rogers* required reversal even though it was not claimed as error in the Court of Appeals or in the Supreme Court; indeed, Your Honors took notice of the error *sua sponte*. *Id.* at 41, 45 L.Ed.3d at 7.[16]

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[15] *Accord, Shields* v. *United States*, 273 U.S. 583, 71 L.Ed. 787 (1927), discussed with approval in *Rogers, supra*, 422 U.S. at 39, 45 L.Ed.2d at 6. *Shields* and *Fillippon, supra*, on the basis of which *Rogers* was decided, leave no room for doubt that the violation here was constitutional, not merely a violation of the Rule.

[16] In the following cases, reviewing courts have reversed convictions obtained after the trial court communicated with the jury without notice to the defense: *Ah Fook Chang* v. *United States*, 91 F.2d 805, 809-10 (9 Cir. 1937); *United States* v. *Treatman*, 524 F.2d 320 (8 Cir. 1975); *Rice* v. *United States*, 356 F.2d 710, 715-18 (8 Cir. 1966); *United States* v. *Glick*, 463 F.2d 491 (2 Cir. 1972); *United States* v. *Benavides*, 549 F.2d 392 (5 Cir. 1977); *Akins* v. *Cardwell*, 500 F.2d 47 (9 Cir. 1974) (habeas corpus); *United States* v. *Schor*, 418 F.2d 26 (2 Cir. 1969); *United States* v. *Neal*, 320 F.2d 533 (3 Cir. 1963). Interestingly, in *Akins* v. *Cardwell, supra*, denial of habeas corpus was reversed, where the violation involved rereading of an instruction already given, at the jury's request and without notice to the defense.

Here, there was no arguable reason not to notify the defense. When the court dealt with the query, it was 3:00 p.m., within normal working hours. (Tr. 1302)

> "Judicial comments in the presence of the jury are subject to special scrutiny because of the recognized fact that 'the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.' " *United States* v. *Dellinger*, 472 F.2d 340, 386 (7 Cir. 1973), quoting from *Starr* v. *United States*, 153 U.S. 614, 626, 38 L.Ed. 841, 846 (1894); *accord, Quercia* v. *United States*, 289 U.S. 466, 472, 77 L.Ed. 1321, 1326 (1933).

Considering that here, the violation of defendant's constitutional right to be present at all stages of the proceedings, as codified by Rule 43, was characterized by the Court of Appeals as a "discussion" of an "extended nature," (App. A, p. App. 7), it is folly to presume the error of the court's unauthorized contact with the jury was harmless as regards the mail fraud counts, given the factual context and interrelationship between the conspiracy and mail fraud charges.[17]

Supervisory Power

This anomalous decision should not be permitted to stand as the law of the land on these crucial and vital issues concerning the integrity—or, shall we say, sanctity —of the jury room, and the right to be heard, inherent in the right to be present, which is part and parcel of due process of law.

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[17] To pare a phrase from another context: " 'if you throw a skunk into the jury box, you can't . . . [expect] the jury not to smell it'." *Dunn* v. *United States*, 307 F.2d 883, 886 (5 Cir. 1962).

To allow these convictions to stand amounts to giving *carte blanche* to the District Judges to communicate with juries without advance notice to the defense—in other words, to put it bluntly, to invade the sanctosanct privacy of the jury room. In multi-count cases, as here, this dangerous decision means that as long as the specific colloquy does not touch upon all the counts, the court can rest assured that at least some of the convictions will be upheld. "Against that pernicious doctrine this Court should resolutely set its face."[18]

Exercise of this Court's supervisory power, see *McNabb* v. *United States*, 318 U.S. 332, 340, 87 L.Ed. 819, 824 (1943), serves the dual purpose of deterring the undesirable behavior and cultivating respect for the integrity of the judicial process. *Elkins* v. *United States*, 364 U.S. 206, 217, 4 L.Ed.2d 1669, 1677 (1960); *Mallory* v. *United States*, 354 U.S. 449, 453, 1 L.Ed.2d 1479, 1482 (1957).

To enforce the constitutional rights encompassed within Rule 43, this Court should grant certiorari and reverse the mail fraud convictions in the exercise of its supervisory power to regulate the administration of criminal justice.

CONCLUSION

For the foregoing reasons, certiorari should be allowed.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner

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[18] From Justice Brandeis' dissent in *Olmstead* v. *United States*, 277 U.S. 438, 485, 72 L.Ed. 944, 960 (1928), which has since become the prevailing view with respect to requiring the government "to observe the law scrupulously." *Ibid.* See *Elkins* v. *United States*, 364 U.S. 206, 223, 4 L.Ed.2d 1669, 1681 (1960).

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 81-2024, 81-2028

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BARTLEY BURNS and LAWRENCE KELLY,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 80-CR-517—James B. Moran, *Judge.*

Argued April 15, 1982—Decided July 16, 1982

Before PELL, *Circuit Judge,* GIBSON,* *Senior Circuit Judge,* and ESCHBACH, *Circuit Judge.*

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* The Honorable Floyd R. Gibson, United States Senior Circuit Judge for the Eighth Circuit, sitting by designation.

PER CURIAM. One of the issues presented in these federal criminal appeals concerns a situation in which the trial judge, in response to a request from the jury for a supplementary instruction, entered the jury room during deliberations without advance notice to the defense and gave the jurors an oral definition of an element of one of the offenses charged in the indictment. Because of our concern for the orderly conduct of a trial by jury in a federal criminal case, we reverse and remand defendants' convictions as to the count which was the subject of the supplementary instruction. Finding no reversible error pertinent to the other counts of which defendants were convicted, we affirm the convictions on those counts and remand for resentencing in accordance with this decision.

I

Between 1974 and 1980, several high-ranking employees of the Cook County (Illinois) Board of Appeals effectuated thousands of unlawful property tax reductions by covertly circumventing the Board's procedures concerning applications for assessment reductions. They relied on others, known as "runners," to contact taxpayers and solicit payments from them in exchange for arranging reduced property tax assessments. The runners collected payments from the taxpayers concerned and divided the proceeds with the Board employees who participated in the scheme. Defendants Bartley Burns and Lawrence Kelly were accused of serving as "runners." They maintain that they had no knowledge of the unlawful nature of the scheme in question. In a multiple count indictment, they were both charged with several counts of mail fraud and one count of conspiracy to violate the mail fraud and antiracketeering laws. Kelly was also charged with tax

evasion and obstruction of a criminal investigation. The jury acquitted Burns on three mail fraud counts (counts 24, 26 and 30) but found him guilty on the conspiracy charge (count 1) and on seven mail fraud counts (counts 22, 23, 25, 27, 28, 29 and 31). His disposition as to count 1 involved a 3 month sentence and a $10,000.00 fine; as to counts 22, 23, 25, 27, 28, 29 and 31, he received concurrent sentences of three years probation, consecutive to the sentence on count 1. Kelly was found guilty on the conspiracy charge (count 1), the tax evasion and obstruction charges (counts 41 and 90) and on nine mail fraud counts (counts 32 through 40). Kelly received a sentence of fifteen months on count 1, he was fined a total of $5,000 on counts 32 through 40, and he received concurrent sentences of 3 years probation on counts 41 and 90, to run consecutively to the sentence on count 1.

In addition to their challenge to the judge's private contact with the jury, defendants argue as to the conspiracy charge (count 1) that the antiracketeering statute does not apply to corruption within the Cook County Board of Appeals and that there was a prejudicial variance between the conspiracy charged in the indictment and the evidence adduced at trial. Defendants also attack a jury instruction concerning the issue of guilty knowledge.

II

After the jury had been fully instructed by the court and had been engaged in deliberations for several hours, one juror apparently encountered some difficulty as to the meaning of the term "overt acts" with reference to the conspiracy count. Although the record does not indicate how the matter was brought to the court's attention, it is clear that the trial judge responded by entering the

jury room accompanied only by the court reporter, whereupon he voiced a supplementary instruction defining an "overt act." The resulting colloquy in the jury room, which occurred without advance notice to defendants or defense counsel, was transcribed by the court reporter as follows:

> The Court: Good afternoon.
> You asked what the definition of an overt act is.
> A Juror: Yes.
> The Court: An overt act is an open or manifest act. It is not what somebody thinks or plans; it is what somebody does.
>
> In this case, it is charged that one or more of the things happened in paragraphs 12 through 17 or paragraphs 22 through 41, and these were done in furtherance of, according to the Government, the conspiracy.
> So, an overt act in that context is one of those active type actions, if proved, in furtherance of the conspiracy, if proved, as distinguished from something that somebody just planned or thought about but didn't take any action on.
> A Juror: Something actually happened?
> The Court: Something that actually happened.
> Does that help?
> A Juror: Okay.
>
> The Court: So, what the Government is charging is that certain things happened or at least one of them happened, and that what that was was in furtherance of the conspiracy as defined in the instructions.
> A Juror: Everybody understand?
> A Juror: Yes.
> A Juror: I think so.
> A Juror: That clears it up. Thank you.

Defendants raise three challenges to this conversation. They argue that it was a violation of their Sixth Amendment right to be present at all stages of the proceedings; they argue that it was a violation of Rule 43(a), Federal

Rules of Criminal Procedure; and they argue that the supplementary instruction was a misleading statement of the law. Since we sustain their contention under Rule 43(a), we need not address the constitutional issue and we likewise decline to evaluate the legal soundness of the supplementary definition.

Rule 43(a) provides as follows:

> The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

While we are certain that the trial judge was acting with the best of intentions, we are equally convinced that his action was a serious violation of Rule 43(a). The Supreme Court has clearly prescribed the procedures mandated by the Rule in the context of questions emanating from the jury room: "Cases interpreting [Rule 43(a)] make it clear, if our decisions prior to the promulgation of the Rule left any doubt, that the jury's [question] should have been answered *in open court* and that [defendants'] counsel should have been given an *opportunity to be heard* before the trial judge responded." *Rogers* v. *United States*, 422 U.S. 35, 39 (1975) (Burger, C.J.) (emphasis added).[1] Although this brief reference to the *Rogers* opinion is perhaps sufficient to reveal the error inherent in the trial court's conduct, we feel constrained to emphasize our condemnation of this practice.

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[1] In the absence of a clear waiver by the defendant personally, we feel that the district courts in this Circuit should make every effort to observe the procedures endorsed in the *Rogers* opinion.

Two important interests are undermined by private discourse between judge and jury during deliberations. First, it gives rise to "Star Chamber" implications which detract from the appearance of justice. Second, it absolutely precludes the parties from making a record as to the context in which the judge's remarks were made, thereby thwarting appellate review; the parties and this court must remain forever in the dark as to the judge's tone of voice and physical demeanor while he was in the jury room. An additional concern implicated in this particular case is the risk that the judge will be drawn into an extended discourse with the jury, thereby disturbing the delicate balance of legal principles set forth in the original instructions. Although we find it unnecessary to consider whether the judge's statements in the jury room, standing alone, would constitute a sound definition of an "overt act," we are concerned that the discussion of the overt act requirement may have diverted the jury's attention from other essential elements of the conspiracy offense. In a recent appeal from a civil jury trial, the United States Court of Appeals for the Third Circuit stressed that when a supplemental instruction is given,

> trial courts should avoid prejudicial emphasis on part of the case by carefully reminding the jury of other aspects of the original charge and cautioning them that the segment of the charge which is amplified or explained should be considered in the light of the other instructions and is not to be given undue weight.

Beardshall v. *Minuteman Press International, Inc.*, 664 F.2d 23, 29 (3d Cir. 1981).

In some circumstances a violation of Rule 43(a) may be harmless error. *Rogers, supra*, 422 U.S. at 40. However, in the factual context of this case, and considering

the extended nature of the discussion between the court and the jury, we are unable to say that the defendants were not prejudiced by the error of the court. We reverse the convictions of both defendants as to the conspiracy count (count 1) and remand for further proceedings if the government desires to pursue this count.[2]

On the other hand, we reject defendants' argument that the discussion in the jury room deprived them of a fair trial altogether, thus mandating reversal of all counts of which they were convicted. The jury was selective in its approach to the case, and did not convict the defendants on all the counts charged. The nature of the verdicts that were returned in this case makes it clear that the jury separately analyzed the law and the evidence applicable to each count. Moreover, it should be evident from our analysis of the implications of the contact between judge and jury that the potential prejudice, if any, relates exclusively to the jury's disposition of the conspiracy count. There is no basis for concluding that the jury's disposition of the other counts in the indictment might have been influenced in any manner by a discussion which was confined by its terms to an issue relating exclusively to the conspiracy count.

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[2] Defendants' alternative challenges to their convictions on the conspiracy count are entirely without merit. The illegal scheme in this case was clearly a corrupt "enterprise" within the meaning of 18 U.S.C. §1961(4), even though it involved a public entity. *See United States* v. *Lee Stoller Enterprises, Inc.*, 652 F.2d 1313 (7th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 102 S.Ct. 636 (1981). We also find no improper variance between the conspiracy charged in the indictment and the evidence adduced at trial.

III

The trial court gave the following instruction concerning the issue of defendants' knowledge:

> When the word "knowingly" is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of this conduct and did not act through ignorance, mistake or accident. Knowledge may be proven by [the] defendant's conduct and by all the facts and circumstances surrounding the case. *No person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate.*

(emphasis added). The final sentence of the instruction, which we render in italics, was the subject of a timely defense objection at trial. Having preserved their objection, defendants argue on appeal that the sentence violates the rule in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), and that it permits a jury to find criminal culpability on the basis of mere negligence. We reject both contentions.

Although we have approved the challenged sentence several times in the past, *e.g.*, *United States* v. *Gabriel*, 597 F.2d 95, 100 (7th Cir.), *cert. denied*, 444 U.S. 858 (1979); *United States* v. *Prewitt*, 553 F.2d 1082, 1087 (7th Cir.), *cert. denied*, 434 U.S. 840 (1977); *United States* v. *Joyce*, 499 F.2d 9, 23 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974); this appears to be the first occasion this court has had to reevaluate it in the light of the Supreme Court's decision in *Sandstrom* v. *Montana*, *supra*. In a case in which intent was an essential element of the crime charged, the *Sandstrom* decision held that the instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts," violated the requirement that the government prove every element of the offense beyond a reasonable doubt.

The general inquiry in *Sandstrom* was whether the language of the challenged sentence was such that the jury *could* have interpreted the instruction in a way that would impermissibly "reliev[e] the State of the burden of proof . . . on the critical question of [the defendant's] state of mind." 442 U.S. at 521. The *Sandstrom* analysis condemns instructions which could be interpreted as imposing conclusive presumptions of intent or rebuttable presumptions which shift to the defendant the burden of persuasion concerning the mental element. *See id.* at 522-23. On the other hand, *Sandstrom* does not necessarily condemn an instruction which merely describes a rationally-based permissive inference: for example, one that allows but does not require the jury to infer knowledge from a defendant's exposure to information capable of engendering the knowledge. *See* 442 U.S. at 514; *id* at 527 (Rehnquist, J., concurring).

Analysis of the challenged sentence in the context of the "knowledge" instruction as a whole shows that it merely operates as an illustration of a rational permissive inference. The notion that no person can intentionally avoid knowledge is little more than a truism. This part of the sentence simply says that once the defendant has received *and comprehended* a message he is powerless to banish it from his mind. The remainder of the sentence illustrates how the cognitive process operates. Since this part of the sentence refers to "facts which should prompt [*the defendant*] to investigate," it advances the idea that one's ability to acquire knowledge depends upon the strength of the message and one's subjective capacity to comprehend it. Moreover, the challenged sentence follows immediately after the sentence which apprises the jury that knowledge *may* be inferred from salient facts and circumstances. In such a context,

it functions as an illustration of how knowledge may be inferred from a defendant's exposure to information. Finally, the sentence challenged in this case is not expressly labeled as a legal presumption, whereas the jury in *Sandstrom* had been instructed that *the law* presumes a person intends the ordinary consequences of his voluntary acts. Since the sentence lacks the express mandate of a legal presumption and follows immediately after a statement that knowledge "may be proved" by circumstantial evidence, we are satisfied that no juror could have understood it to impose a presumption of the ultimate fact of knowledge upon proof of an elemental fact of exposure to information. We also note that the *Sandstrom* holding was buttressed by the fact that "[t]he standard reference work for federal instructions, 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions 405 (3d ed. 1977) describes the instruction [in *Sandstrom*] . . . as constituting 'reversible error' . . . ." 442 U.S. at 514 n.3. Even in the aftermath of *Sandstrom*, the "standard reference work" does not attach such a label to the instruction challenged in this case. *See* 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 14.09 (3d ed. 1977 & Supp. 1981). It harbors none of the prejudicial ambiguities condemned in *Sandstrom*.

We are also satisfied that the sentence does not allow a jury to find criminal culpability on the basis of negligence. *See United States* v. *Johnson*, 515 F.2d 730, 732-33 n.7 (7th Cir. 1975); *United States* v. *Grizaffi*, 471 F.2d 69, 75 (7th Cir. 1972), *cert. denied*, 411 U.S. 964 (1973). The analytical process it contemplates is triggered only upon proof of *intentional* avoidance of knowledge, and it speaks in terms of information which should require the defendant *himself* (and not a reasonable person) to investigate. The sentence calls for a subjective inquiry, rather than an objective one.

While the accepted instruction regarding the intentional avoidance of knowledge may be somewhat opaque,[3] we hold that it is consistent with due process. It does not permit any interpretation that would have the effect of relieving the government of its burden of proving the requisite mental element beyond a reasonable doubt.

IV

Since it is at least possible that the fines and sentences on the other counts were influenced by the fact that the jury found defendants guilty on count 1, we remand for resentencing. Whether the sentences and fines on the remaining counts shall remain the same or be reduced is entirely a matter for the trial judge and we express no view on this question.

Defendant Burns' convictions on counts 22, 23, 25, 27, 28, 29 and 31 and defendant Kelly's convictions on counts 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 and 90 are affirmed. Their convictions, fines and sentences on count 1 are reversed and remanded and the case is remanded for resentencing on all the other counts on which they were convicted.

AFFIRMED IN PART, AND REVERSED AND REMANDED IN PART.

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[3] The United States Court of Appeals for the First Circuit recently referred to an analogous "wilful blindness" instruction as "admittedly unusual" but held that it was not an erroneous charge under the facts of the case. *United States* v. *Ciampaglia*, 628 F.2d 632, 643 (1st Cir.), *cert. denied*, 449 U.S. 956 (1980).

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
November 16, 1982.

Before
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge
Hon. Floyd G. Gibson, Senior Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 81-2028 vs.

BARTLEY BURNS,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 81-2024 and 81-2028

BARTLEY BURNS and LAURENCE† KELLY,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. 80-CR-517
James B. Moran, Judge

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* The Honorable Floyd R. Gibson, United States Senior Circuit Judge for the Eighth Circuit, sitting by designation.

† *Sic.*; should be, Lawrence.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellee and on consideration of the petition for rehearing and suggestion for rehearing en banc by the defendant-appellant, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to edny a rehearing either to the plaintiff-appellee or to the defendant-appellant. Accordingly,

IT IS ORDERED that each of the aforesaid petitions for rehearing be, and the same are hereby, DENIED.